## MUHAMMAD ADLI ELAIYARAJA ABDULLAH v. PP

HIGH COURT MALAYA, PULAU PINANG
AMIRUDIN ABD RAHMAN JC
[CRIMINAL REVISION NO: PB-43-3-04-2022]
20 MAY 2022

**Abstract** – *No person can be punished twice for the same offence. A person who has been charged, convicted and sentenced for an offence, by a court of competent jurisdiction, can never be charged and sentenced for the same offence again. The conviction is a bar to all further proceedings for the same offence. The same applies when a person is acquitted; an acquitted person is not to be charged and sentenced for an offence he had previously been acquitted for.*

***CRIMINAL PROCEDURE:*** *Revision – Double jeopardy – Applicant charged, convicted and sentenced twice – Same offence, facts and ingredients – Whether there was double jeopardy – Whether there was illegality and miscarriage of justice – Whether entire proceedings of second prosecution nullity – Whether conviction and sentence in second prosecution ought to be set aside – Criminal Procedure Code, ss. 302, 303 & 323(1)*

***CRIMINAL PROCEDURE:*** *Revision – Autrefois convict – Double jeopardy – Applicant charged, convicted and sentenced twice – Same offence, facts and ingredients – Whether there was double jeopardy – Whether there was illegality and miscarriage of justice – Whether entire proceedings of second prosecution nullity – Whether principle of autrefois convict applied – Criminal Procedure Code, ss. 302, 303 & 323(1)*

***CONSTITUTIONAL LAW:*** *Constitutional rights – Double jeopardy – Rule against double jeopardy – Applicant charged, convicted and sentenced twice – Same offence, facts and ingredients – Whether there was double jeopardy – Whether unconstitutional – Federal Constitution, art. 7(2)*

In this criminal revision, the applicant submitted that an incident of double jeopardy had occurred at the Jawi Magistrate's Court where he was charged and convicted twice for the same offence, namely self-administration of drugs, pursuant to s. 15(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The records of proceedings showed that the applicant was first charged on 11 February 2022 and he had pleaded guilty. The applicant was then sentenced to a fine of RM1,500, in default two months' imprisonment and ordered to undergo supervision for a period of two years. The following month, on 25 March 2022, the applicant was again charged at Jawi Magistrate's Court, before the same Magistrate, for the same offence and the same sentence was handed down ('second prosecution').

A **Held (setting aside conviction and sentence in respect of second prosecution and declaring entire proceedings as nullity):**

**(1)** It was relatively apparent that both cases at the Jawi Magistrate's Court involved the same offence *ie*, self-administration of dangerous drugs, an offence pursuant to s. 15(1)(a) of the DDA. The applicant was charged under an identical provision of law and facts. References were made to like exhibits. Both prosecutions took place before a court of competent jurisdiction. There was not even an ounce of doubt that the second prosecution and trial against the applicant amounted to double jeopardy as it involved the same offence, facts and ingredients. (paras 8, 20 & 21)

**(2)** The rule against double jeopardy exists in the Federal Constitution ('FC') under Part II, art. 7(2). This constitutional provision guarantees the rights of all members of society from repeated trials once a person has either been convicted or acquitted for an offence. The only exception are cases that have been ordered for retrial by a higher court. The Criminal Procedure Code ('CPC') has also incorporated the rule against double jeopardy by virtue of s. 302. The Interpretation Acts 1948 and 1967, by virtue of s. 59, too prohibits a person from being punished twice for the same offence. (paras 14-17)

**(3)** The prosecution, in the second prosecution, would be barred by the plea of *autrefois convict*, which means 'previously convicted' (while *autrefois acquit* means 'previously acquitted'). The procedure to invoke the plea of *autrefois convict* and *autrefois acquit* are codified in the CPC, by virtue of s. 303. Section 303 of the CPC connotes that a plea of *autrefois convict* and *autrefois acquit* must be raised at the first instance in the trial court when a person is charged. This was not done by the applicant in the second prosecution. However, in exercising the revisionary powers of the High Court, it was not the court's concern whether or not an accused had pleaded *autrefois convict* and *autrefois acquit* but rather was their miscarriage of justice. Section 323(1) of the CPC permits the High Court to act in revision to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed by a subordinate court. Thus, when double jeopardy occurs, illegality ensues. Therefore, the High Court must act to cure the miscarriage of justice. (paras 22, 23, 25 & 26)

**(4)** The sentence passed in the second prosecution contravened the rule against double jeopardy and was in breach of art. 7(2) of the FC. The conviction and sentence were unconstitutional and a nullity and, therefore, set aside. (paras 36 & 37)

***Obiter:***

**(1)** Magistrates, Prosecutors and defence counsel in courts should not view the process of prosecuting, defending and sentencing a person who pleads guilty as a mechanical process. The process should not take place hastily and without serious consideration. All the components play a vital role in ensuring strict observance of natural justice principles and the rule of law in every criminal proceeding no matter how trivial the offence may be. From the charges pursued against the applicant in both cases, glaring inattention appears. The dangerous drug itself was spelt as 'metthampetamine' instead of 'methamphetamine'. No one noticed this and no effort was made to even rectify it. The logical inference would be that the proceeding was conducted hurriedly and without much consideration. The focus was to deal with the plea of guilt and to get over the case hastily. (para 29)

**(2)** It was bewildering since both cases were presided by the same Magistrate, Prosecutor and defence counsel and none of them was conscious that the same person was being charged for the same offence at the same court within a month gap. It was unfair to put any fault on the applicant for failing to raise the plea *autrefois convict*; without proper guidance, he pleaded guilty to the same charge. Understandably, the rule against double jeopardy is alien to those outside the legal fraternity. The defence counsel representing the applicant ought to have realised this on the second occasion as it was her duty to act in the applicant's best interest and provide the necessary legal advice accordingly. (para 30)

**(3)** It was regretful that such a straightforward case led to the breach of a constitutional guarantee and violated principles of natural justice and the rule of law. Situations akin to this should never occur again. Due to the court officers' carelessness, the applicant may have spent time in prison and lose his personal liberty. Losses such as these are irremediable. (para 35)

**Case(s) referred to:**

*Heng Kim Khoon v. PP [1971] 1 LNS 38 HC* ***(refd)***
*Institute of Chartered Accountants of India v. Vimal Kumar Surana & Anor (2011) 1 SCC 534* ***(refd)***
*Jamali Adnan v. PP [1985] 2 CLJ 415; [1985] CLJ (Rep) 167 SC* ***(refd)***
*Kalawati & Anor v. The State of Himachal Pradesh, 1953 SCR 546* ***(refd)***
*Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA* ***(refd)***
*Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC* ***(refd)***
*Ram Ranjan Roy v. Emperor (1915) ILR 42 Cal 422* ***(refd)***
*Wemyss v. Hopkins (1875) LR 10 QB 378* ***(refd)***
*Zahira Habibullah Sheikh & Anor v. State of Gujarat & Ors [2006] 2 MLJ (Crl) 517* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 32
Criminal Procedure Code, ss. 302(1), 303(1), 323(1)
Dangerous Drugs Act 1952, ss. 15(1)(a), 38B
Federal Constitution, art. 7(2)
Interpretation Acts 1948 and 1967, s. 59
Legal Profession (Practice and Etiquette) Rules 1978, r. 16

*For the applicant - Sivakumar Valla Krishnan; M/s VS Kumar & Co*
*For the respondent - Nurameera Shahrul Azrin; DPP*

*[Editor's note: Appeal from Magistrate's Court; Criminal Case Nos: PE-83D-218-02-2022 & PE-83D-358-03-2022.]*

*Reported by Najib Tamby*

## JUDGMENT

**Amirudin Abd Rahman JC:**

**Background Of Application**

**[1]** By way of a letter received from the applicant's solicitors, Messrs VS Kumar & Co on the 5 April 2022, it was brought to the attention of this court that an incident of double jeopardy had occurred at the Jawi Magistrate's Court. The letter amongst others claimed that the applicant named Muhammad Adli Elaiyaraja bin Abdullah had been charged and convicted twice for the same offence pursuant to s. 15(1)(a) of the Dangerous Drugs Act 1952 ("DDA 1952"). Hence the applicant pleaded for the High Court to exercise its revisionary powers concerning the matter at hand.

**[2]** Upon receiving the said letter, this court had called for the records of proceedings from Jawi Magistrate's Court in accordance with s. 323 of the Criminal Procedure Code ("CPC"). Inspection of the records of proceedings reflected that the applicant was first charged on 11 February 2022 *vide* case number PE-83D-218-02-2022 at the Jawi Magistrate's Court. The charge against the applicant was as follows:

> Bahawa kamu pada 07/12/2021 jam lebih kurang 0950 malam bertempat di pejabat bahagian siasatan jenayah narkotik ibu Pejabat Polis Daerah Seberang Perai Selatan, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang, telah di dapati memberikan kepada diri kamu sendiri dadah berbahaya iaitu metthampetamine dan dengan itu kamu telah melakukan suatu kesalahan dibawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952 yang boleh di hukum dibawah seksyen 15(1) dan dibaca bersama seksyen 38B Akta yang sama.

**[3]** The applicant was then represented by the National Legal Aid Foundation (YBGK) and not the current solicitors, Messrs VS Kumar & Co and at the first instance the applicant had pleaded guilty to the charge. The Deputy Public Prosecutor ("DPP") then informed the Magistrate's Court that the facts were as per the charge and then submitted a police report

(Nibong Tebal Report 8501/21) marked as P1 as well as a urine test report (laporan ujian pengesanan dadah dalam air kencing) from Kepala Batas Hospital dated 19 January 2022 marked as P2.

**[4]** The Magistrate then upon hearing the mitigation from the counsel from YBGK and the DPP seeking an adequate sentence, then sentenced the applicant to a fine of RM1,500 (in default two months imprisonment) and ordered the applicant to undergo supervision pursuant to s. 38B of the DDA 1952 for a period of two years commencing from 11 February 2022. The applicant paid the fine imposed.

**[5]** Yet again, on the next month which was on 25 March 2022 the applicant was again charged at Jawi Magistrate's Court *vide* case number PE-83D-358-03-2022. The applicant was again represented by the same counsel from YBGK and the same DPP appeared for the prosecution. The case was again presided by the same Magistrate, Puan Noor Farah Hazwani binti Osman. The charge framed against the applicant on this occasion was as follows:

> Bahawa kamu pada 07/12/2021 jam lebih kurang 9.50 malam bertempat di pejabat bahagian siasatan jenayah narkotik Ibu Pejabat Polis Daerah Seberang Perai Selatan, di dalam daerah seberang perai selatan, di dalam Negeri Pulau Pinang, telah di dapati memberikan kepada diri kamu sendiri dadah berbahaya iaitu methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan dibawah Seksyen 15(1)(A) Akta Dadah Berbahaya 1952 yang boleh di hukum dibawah seksyen 15(1) dan dibaca bersama seksyen 38B Akta yang sama.

**[6]** The DPP this time had put forward a written facts of the case which was marked as exh. P1 and then submitted again the same police report (Nibong Tebal Report 8501/21) marked as P2 and the same urine test report (laporan ujian pengesanan dadah dalam air kencing) from Kepala Batas Hospital dated 19 January 2022 marked as P3.

**[7]** After hearing the mitigation by the counsel for YBGK and the DPP's submission for an adequate sentence, the applicant was again convicted and sentenced by the Magistrate to a fine of RM1,500 (in default two months imprisonment) and ordered the applicant to undergo supervision pursuant to s. 38B of the DDA 1952 for a period of two years this time commencing from 25 March 2022.

**Rule Against Double Jeopardy**

**[8]** Upon scrutiny of the records of proceedings, it is pertinently clear and incontestable that the applicant had been charged twice for the same offence which was self-administration of the dangerous drug methamphetamine on 7 December 2021 which is an offence pursuant to s. 15(1)(a) DDA 1952 and punishable under s. 15(1) of the same Act.

**[9]** However simple it may sound, the occurrence of double jeopardy is a very grave and forbidding situation and must not be looked upon lightly. Not only in Malaysia but almost all jurisdictions impede and forbids double jeopardy to take place as the rule against double jeopardy is one of the foundations of criminal law and natural justice itself. The rule against double jeopardy is an ancient doctrine that has been in existence ever since early civilisations as it formed a basis for a formation of a criminal justice system. The origin of double jeopardy is unclear, however, ancient civilisations such as the Athenians, Romans, Greeks and later English common law leaves a record that it is embedded in their criminal justice system. The Athenians used this principle since 355 BC while the Romans later had this principle codified in the Digest of Justinian by AD 533. It asserted that "the Governor should not permit the same person to be again accused of crime of which he has been acquitted". From its long history, it is undeniable that the rule against double jeopardy is a basic right protecting the liberty of all persons that can never be taken away and exists for the protection of society as a whole.

**[10]** The rule against double jeopardy is based on the Latin maxim "*Nemo Debet Bis Vexari Pro Una Et Eadem Causa*", which means no person can be punished twice for the same offence. When a person has been charged, convicted and then sentenced for an offence by a court of competent jurisdiction, he can never be charged and sentenced for the same offence again. The conviction is a bar to all further proceedings for the same offence. The same applies when a person is acquitted. An acquitted person is not to be charged and sentenced for an offence he has previously been acquitted for.

**[11]** By the seventeenth century, the pleas of *autrefois acquit* (prior acquittal) and *autrefois convict* (prior conviction) had become firmly embedded principles of the English common law. Jurist, Sir William Blackstone expressed that, "The plea of *autrefois acquit* ... is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence.

**[12]** in a nutshell, the rule means that once an order of conviction or acquittal is held by a court of competent jurisdiction, that a person who is charged with committing an offence stands, that person cannot again be tried on the same facts for the offence for which he was tried and convicted before.

**[13]** The rule against double jeopardy is to protect all persons against the excessive burden of multiple trials instituted by the States. Repeated trials on the same offence will put an individual to live in a state of anxiety and insecurity, embarrassment and expense. With all the resources and power, the state should not be allowed to make repeated attempts to charge a person for the same offence.

**[14]** The rule against double jeopardy exists in the law of the land, which is the Federal Constitution under Part II, art. 7(2), which provides:

> **7. Protection against retrospective criminal laws and repeated trials**
>
> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
>
> (2) *A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.*
>
> (emphasis added)

**[15]** This constitutional provision guarantees the rights of all members of society from repeated trials once a person has either been convicted or acquitted for an offence. The only exception are cases that have been ordered for retrial by a higher court. Another rationale for the existence of the rule against double jeopardy in criminal trials is principally to put a rest to a case. This means that once a court of law has adjudicated on a matter, the decision of that court of law is final and can never been reopened or revisited under any circumstances unless on appeal or revision by a more superior court of law (see *Kalawati & Anor v. The State of Himachal Pradesh*, 1953 SCR 546: AIR 1953 SC 131). It would be against the rule of law if a person can be tried and sentenced again and again in a never-ending loop. The thought facing prosecution, trial or another sentence for the same offence even after serving a sentence or after going through a trial and earning an acquittal, would torment any person. At the back of the mind of the person, the thought that he could face another sentence or another trial in *ad infinitum* would be torturous and despairing. In the simplest of terms, the rule against double jeopardy exists to avoid harassment of multiple litigation and puts it to rest.

**[16]** Correspondingly, the Criminal Procedure Code has also incorporated the rule against double jeopardy by virtue of s. 302. The provision states:

> 302 Person once convicted or acquitted not to be tried again for same offence
>
> (1) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 166 or for which he might have been convicted under s. 167.
>
> (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection 165(1).

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(3) A person convicted of any offence constituted by any act causing consequences which, together with that act, constituted a different offence from that of which he was convicted, may be afterwards tried for that last mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was convicted.

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(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding the acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

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(5) The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

**[17]** The provision above expounds the rule against double jeopardy. In general, s. 302(1) of the CPC provides that if a person has been tried for an offence in a court of competent jurisdiction, and the trial either resulted in

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a conviction or acquittal, the said person shall not be tried again for the same offence. The Interpretation Acts 1948 and 1967 also prohibits a person from being punished twice for the same offence. Section 59 of the Interpretation Acts 1948 and 1967 states:

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59 Offences under two or more laws

Where any act or omission constitutes an offence under two or more written laws, or under a written law and at common law, the offender shall be liable to be prosecuted and punished under either or any of those laws or at common law, but shall not be liable to be punished twice for the same offence.

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**[18]** The phrase "same offence" had been deliberated by the Supreme Court in *Jamali Adnan v. PP* [1985] 2 CLJ 415; [1985] CLJ (Rep) 167; [1986] 1 MLJ 162, where His Lordship George Seah SCJ referred to English, American and Indian authorities in explaining the phrase. The learned SCJ

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states that:

The phrase "same offence" is used in Article 7(2) of the Federal Constitution, in s. 59 of the Interpretation Act 1967 and in s. 302(i) of the CPC. In *R v. Kupferberg* (1918) 13 CrApp R 166 168 AT. Lawrence J. said that "the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have

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the same essential ingredients ..." This case was cited by Lord Morris in the *Connelly* case (*supra*) at page 1324. In the Indian Supreme Court the expression "same offence" has been interpreted to mean "an offence whose ingredients are the same" (see *State of Bombay v. SL Apte* AIR 1961 SC 578 and *Manipur Administration v. Bira Singh* AIR 1965 SC 87). We agree

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and accept this construction by the Indian Supreme Court and would adopt it in construing the phrase "same offence" in the administration of criminal justice in this country.

**[19]** In addition, the Indian Supreme Court in *Institute of Chartered Accountants of India v. Vimal Kumar Surana & Anor* (2011) 1 SCC 534; [2011] 1 MLJ (CRL) 437 stipulates that the test to determine double jeopardy is whether the subsequent offence charged has the same ingredients. In other words, the facts establishing the former offence are adequate to warrant a conviction for the subsequent offence. The Indian Supreme Court ruled:

> The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials ...
>
> In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred ...

**[20]** In the case at hand, it is relatively apparent that both cases at the Jawi Magistrate's Court involved the same offence. The applicant was charged under an identical provision of law and facts. Furthermore, references were made to like exhibits. Both prosecutions took place before a court of competent jurisdiction. The Jawi Magistrate's Court is presided by a first-class Magistrate empowered to decide and punish offences committed under s. 15(1) of the DDA 1952. So long as a court of law of competent jurisdiction has sentenced an accused, the same accused cannot be sentenced again for a similar offence. The classic English authority of *Wemyss v. Hopkins* (1875) LR, 10 QB 378 clearly explained that once a person has been tried before a competent tribunal and sentenced, he can never again be tried before another tribunal for the same offence. If he is tried and subsequently convicted, the conviction must be quashed. Blackburn J in his judgment wrote:

> It seems that the same identical matter was brought before a competent tribunal and the appellant was convicted and punished for it; I do not know whether serving the punishment makes any difference; but he was convicted and sentenced for it; and therefore he cannot be tried again for the same thing before another tribunal, and the justices who convicted the appellant a second time made a mistake, and the conviction must be quashed.

**[21]** To that end, there is not even an ounce of doubt that the second prosecution and trial against the applicant amounted to double jeopardy as it involved the same offence, facts and ingredients.

### Plea Of *Autrefois Convict* And *Autrefois Acquit*

**[22]** Based on the given circumstances, the prosecution on the second occasion when the applicant was charged would be barred by the plea of *autrefois convict*. The phrase *autrefois convict* means "previously convicted" while *autrefois acquit* means "previously acquitted". Both are pleas available

to an accused praying to a court of law to halt a criminal prosecution because of having been either previously convicted or previously acquitted for the same offence. These two pleas are a form of invoking the doctrine of double jeopardy and bars a criminal trial from taking place.

**[23]** The procedure to invoke plea of *autrefois convict* and *autrefois acquit* are codified in the Criminal Procedure Code where s. 303 states:

> 303 Plea of previous acquittal or conviction
>
> (1) The plea of a previous acquittal or conviction may be pleaded either orally or in writing, and may be in the following form or to the following effect:
>
> The defendant says that by virtue of s. 302 of the Criminal Procedure Code he is not liable to be tried.
>
> (2) Such plea may be pleaded together with any other plea, but the issue raised by the plea shall be tried and disposed of before the issues raised by the other pleas are tried.
>
> (3) On the trial in the High Court of an issue on a plea of a previous acquittal or conviction the depositions transmitted to the court on the former trial, together with the notes of the Judge if available, and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges.

**[24]** The said provision states that a plea of *autrefois convict* and *autrefois acquit* is to be made either orally or in writing in the manner stated in subs. 303(1) of the CPC. The plea of *autrefois convict* and *autrefois acquit* must first be decided upon before any other matters are decided upon in a trial. In this current case, the applicant had failed to raise the plea of *autrefois convict* when he was charged for the second time. Strangely enough even though the same counsel from YBGK represented the applicant on both occasions, the plea was never raised when the applicant was charged for the second time.

**[25]** It appears that s. 303 of the CPC connotes that a plea of *autrefois convict* and *autrefois acquit* by all means must be raised at the first instance in the trial court when a person is charged. Regrettably, this was not done by the applicant on the second occasion he was charged. However, the opinion of this court is, in exercising the revisionary powers of the High Court, it is not this court's concern whether or not an accused had pleaded *autrefois convict* and *autrefois acquit* but rather was their miscarriage of justice. What is of sheer importance is that a sentence and decision must be revised when there is an illegality. The error made by the subordinate court must be corrected when fundamental principles of law are not abided to. Section 323 of the CPC and s. 32 of the Courts of Judicature Act 1964 [Act 91] confers revisionary powers to the High Courts. Reference to s. 323 of the CPC is made which provides:

323 Power to call for records of subordinate courts

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

(2) Orders made under ss. 97 and 98 are not proceedings within the meaning of this section.

**[26]** Subsection 323(1) of the CPC permits the High Court to act in revision to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed by a subordinate court. Thus, when double jeopardy occurs, illegality ensues, thus, the High Court must act to cure the miscarriage of justice. The Supreme Court in *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 ruled that the High Court should essentially be guided by the goal to correct a miscarriage of justice when exercising revisionary powers. Abdul Hamid Omar CJ states that:

The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice.

**[27]** Correspondingly, the Supreme Court in *Jamali Adnan v. PP (supra)* had faced a situation akin to the present case. The Supreme Court permitted the memorandum of appeal to incorporate the plea of *autrefois convict*, although raised at the final appeal because the newly appointed defence counsel that represented the appellant became alert about it at the final stages. The Supreme Court opined that although s. 303 of the CPC provided that the plea of *autrefois convict* should be brought forward and decided upon before the trial commenced in the trial court, nevertheless, the Supreme Court allowed it for the interest of justice to be raised in the appeal. His Lordship George Seah SCJ held that:

We also allowed the Memorandum of Appeal to be amended so as to permit the Appellant to include the plea of *autrefois convict* as a ground of appeal at the trial in the assigned to defend the appeal at the trial in the High Court stated that no instructions were given to him by the Appellant about the trials, convictions and sentences in the Sessions Court at Johor Bahru in 1981: nor was he aware of these when he was defending the Appellant in the High Court. However; these matters came to light only after a new defence counsel had been assigned to argue the appeal of the Appellant in the Supreme Court. As a matter of procedure, the plea of *autrefois convict* ought to be raised and determined before the commencement of the trial in the High Court (see s. 303 of the CPC) but having regard to the special circumstances of this case and in the interest of justice, we allowed the plea to be raised and argued in the Supreme Court.

**[28]** Accordingly, this court finds that the plea of *autrefois convict* can be accounted by the High Court in the exercise of revisionary powers to correct a miscarriage of justice, as the subsequent conviction would be illegal and unconstitutional. In this current case, the fact that double jeopardy has materialised is apparent and definite from the records of proceedings of the Jawi Magistrate's Court. These records of the proceedings are sufficient to determine with certainty and accuracy that the applicant had been charged twice for the same offence. In addition, the Public Prosecutor has conceded and acknowledged the fact that the prosecution took place twice for the same offence against the applicant.

**Charging And Convicting A Person Should Not Be A Mechanical Process**

**[29]** Before concluding, this court if of the view that Magistrates, Prosecutors and defence counsels (personally appointed or providing legal aid, assigned by the YBGK or the Bar Council Legal Aid) in courts should not view the process of prosecuting, defending and sentencing a person who pleads guilty as a mechanical process. The process should not take place hastily and without serious consideration. All three components play a vital role in ensuring strict observance of natural justice principles and the rule of law in every criminal proceeding no matter how trivial the offence may be. From the charges pursued against the applicant in both cases, glaring inattention appears. The dangerous drug itself is spelt as "metthampetamine" instead of methamphetamine. No one noticed and no effort was made to even rectify it. The logical inference will be that the entire proceeding was conducted hurriedly and without much consideration. The focus is to deal with the plea of guilt and get over the case hastily. On this point, this court is reminded of His Lordship Sharma J *obiter* in *Heng Kim Khoon v. PP* [1971] 1 LNS 38; [1972] 1 MLJ 30:

> A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act. If he pleads guilty under an erroneous view of the law his conviction cannot stand. In such a case the plea of guilty does not avail because he cannot be said to have committed the offence in question in the eyes of the law.

**[30]** It is bewildering since the case was presided by the same Magistrate, the same prosecutor conducting the first and second prosecutions along with the same counsel from YBGK who represented the applicant during the first and second occasions and none of them was conscious that the same person was being charged for the same offence at the same court within a month gap. On top of that, the applicant was given the same sentence again. This court must also add that counsels providing legal aid such as from YBGK should play a more active role and not nominally just record particulars of accused persons to mitigate. Regardless of whether a counsel is self-appointed or appointed under the legal aid scheme, once he/she agrees to represent an

accused in a court of law, the said counsel must act in the best interest of his client and ensure all rights of the person they represent are taken care of. It is also the duty of a counsel representing an accused to provide legal advice and explain the situation that is taking place when a matter is being litigated. In this case, inevitably, this duty was not performed justly and satisfactorily as the counsel from YBGK never did indicate to the trial court that the applicant had been previously sentenced for the same offence by the same court before the same Magistrate just about a month earlier. It is unfair to put any fault on the applicant for failing to raise the plea *autrefois convict*; without proper guidance, he pleaded guilty to the same charge. Understandably, the rule against double jeopardy is alien to those outside the legal fraternity. The counsel from YBGK representing the applicant at that time ought to have realised this on the second occasion, as it was her duty to act in the applicant's best interest and provide the necessary legal advice accordingly.

**[31]** The Legal Profession (Practice and Etiquette) Rules 1978 under r. 16 provides that an advocate and solicitor representing a client, whether in a civil or criminal case, must fearlessly uphold the interest of the client they represent regardless if it is done on legal aid or even *pro-bono*. As an officer of the court, the counsel must be diligent and not act mechanically when representing a person in the court. Rule 16 states:

> Rule 16. Advocate and solicitor to uphold interest of client, justice and dignity of profession.
>
> An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

**[32]** As for the prosecution, although the learned Deputy Public Prosecutor commendably conceded in allowing this revision, the prosecution must always play their respective role, ensuring that the exercise of their powers to initiate prosecutions is done fairly and within the ambits of the law. Prosecutors play a very significant and esteemed role in criminal trials as the powers of the Public Prosecutor is vast and wide. The judgment in *Ram Ranjan Roy v. Emperor* (1915) ILR 42 Cal 422 is worth mentioning concerning this matter where it stated:

> ... the duty of a Public Prosecutor is to represent not the police, but the Crown, and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position.

**[33]** While it is the unfettered discretion of the Public Prosecutor to initiate, continue and discontinue a criminal proceeding against a person, these powers must be exercised conscientiously. A person's fundamental liberties, including that of an accused, must always be prioritised and the principles of natural justice observed. If the Deputy Public Prosecutor

conducts the case attentively and diligently, the oversight is preventable. It would have caused irreversible damage and severe injustice to the applicant if he was imprisoned for two months, due to his failure to pay the fine for the second time he was punished. His incarceration would have been due to the carelessness of charging the applicant twice for the same matter.

**[34]** The same would apply to the Magistrate, as only a court of law can pass down sentences. Vigilance and observance to established legal principles must be present when dealing with criminal cases and should not be conducted mechanically. Magistrates must always play a role in ensuring that an accused's rights and liberties are ultimately protected. Gopal Sri Ram JCA in *Kesavan Baskaran v. PP* [2008] 6 CLJ 390; [2008] 6 MLJ 384 states that, the courts are the guardian of public interest and the last bastion for the victimised and oppressed. The words of the Indian Supreme Court in *Zahira Habibullah Sheikh & Anor v. State of Gujarat & Ors* [2006] 2 MLJ (Crl) 517 also brings profound guidance where the function of the courts is to find out the truth and administer justice with fairness and impartiality and not solely to spectate. The judgment stated:

> Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice – often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

**[35]** It is regretful that in such a straightforward case has led to the breach of a constitutional guarantee and violated principles of natural justice and rule of law. Situations akin to this should never occur again. Due to court officers' carelessness, the applicant may have spent time in prison and lose his personal liberty. Losses such as these are irremediable.

**Decision On Revision**

**[36]** Having perused the records of the proceedings from the Jawi Magistrate's Court, this court finds that the sentence passed in case number PE-83D-358-03-2022 contravened the rule against double jeopardy and was in breach of art. 7(2) of the Federal Constitution.

**[37]** The sentence and conviction are therefore unconstitutional and a nullity. Hence, this court sets aside the conviction and sentence of Jawi Magistrate's Court in respect of case number PE-83D-358-03-2022 towards the applicant and declares the entire proceeding that has taken place as a nullity. The fine of RM1,500 paid by the applicant is to be returned with immediate effect.

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